Supreme Court, U.S.
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No. 00-

IN THE

Supreme Court of the United States

COUNTY OF ALLEGHENY and ALLEGHENY COUNTY, ADULT PROBATION SERVICES,

Cross-Petitioners,

v.

RAYMOND A. BERG, JR.,

Cross-Respondent.

ON CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is the decision of the United States Court of Appeals for the Third Circuit internally inconsistent and contrary to the established law relative to municipal liability as set forth in *Monell v. Department of Social Services*, 436 U.S. 658 (1978); *City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989); *Board of County Commissioners of Bryan County v. Brown*, 520 U.S. 397 (1997) in that the Third Circuit's decision imposes liability on a municipality where there is an absence of a custom or policy adopted by the municipality which resulted in a violation of the respondent's constitutional rights?

2. Is the decision of the United States Court of Appeals for the Third Circuit contrary to the holdings in other jurisdictions in *Harris v. City of Marion*, 79 F.3d 56 (7th Cir. 1996); *Stussy v. Los Angeles*, 1996 W.L. 742433 (9th Cir. 1996); *Palmer v. Unified Gov't. of Wyandotte County*, 72 F. Supp. 1237 (D. Kan. 1999) in that the Third Circuit held that a pattern existed so as to impose liability on a municipality when in fact there had never been a prior incident of an arrest warrant being issued inadvertently by the Clerk of Courts' Office?

3. Does the decision of the United States Court of Appeals for the Third Circuit subject a municipality to liability on a theory that it failed to adequately train its employees when there was no prior incident involving a violation of one's constitutional rights due to a failure to train, contrary to *Board of County Commissioners of Bryan County v. Brown*, 520 U.S. 397 (1997)?

4. Does the decision of the United States Court of Appeals for the Third Circuit subject a municipality to liability based on standards applicable to common law negligence as opposed to the standards applicable to the imposition of liability on a municipality based on a constitutional violation, contrary to *Paul v. Davis*, 424 U.S. 693 (1976) and *Daniels v. Williams*, 474 U.S. 327 (1986).

LIST OF PARTIES

The cross-petitioners are the County of Allegheny; and Allegheny County, Adult Probation Services ("Allegheny County") defendants in the District Court and appellees in the Court of Appeals.

Cross-Respondent is Raymond A. Berg, Jr. ("Berg").

Debbie Benton, who was a party to the initial proceedings in the District Court, was dismissed from the case by stipulation in the district Court and is not involved in the appeal.

Glenn Allen Wolfgang ("Wolfgang"), a defendant in the District Court and appellee in the Court of Appeals is expected to file a cross petition for certiorari with respect to the Court of Appeals ruling against him.

Richard R. Gardner ("Gardner") and Ginny Demko ("Demko") were employees of the County of Allegheny and were defendants in the District Court and appellees in the Court of Appeals. Gardner and Demko are respondents in the Petition for Writ of Certiorari filed by Berg.

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The County of Allegheny respectfully requests that the Supreme Court of the United States grant its Petition for Writ of Certiorari to be issued to the United States Court of Appeals for the Third Circuit in order that the questions presented for review can be resolved to ensure a consistency of the decisions of the appellate courts of the United States and thereby reverse the decision of the United States Court of Appeals for the Third Circuit and reinstate the Order of the United States District Court for the Western District of Pennsylvania granting summary judgment in favor of the County of Allegheny and its employees, Richard R. Gardner and Ginny Demko.

OPINION BELOW

The County of Allegheny seeks review of a decision rendered by the United States Court of Appeals for the Third Circuit, published at 219 F.3d 261 (3d Cir. 2000). That decision reversed, in pertinent part, an unreported opinion and order rendered by the United States District Court for the Western District of Pennsylvania, filed in Civil Action No. 97-928 (W.D. Pa. September 23, 1998). The Court of Appeals opinion, one of the District Court opinions and the denial of rehearing are included in the appendix filed by cross-respondent Berg. The District Court opinion as to Wolfgang was not reported and was not appended to cross-respondent Berg's petition. A copy of the opinion is included in the appendix to this petition.

STATEMENT OF JURISDICTION

Jurisdiction is conferred upon the Supreme Court of the United States pursuant to 28 U.S.C. § 1254(1). On August 17, 2000, Petitioner County of Allegheny's

Petition for Rehearing En Banc or, in the Alternative, for Panel Rehearing of the per curiam opinion and order of the United States Court of Appeals for the Third Circuit, filed July 17, 2000, was denied.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Amendment IV of the United States Constitution

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. Amendment V of the United States Constitution

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence twice to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

3. Amendment XIV of the United States Constitution

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

4. 42 U.S.C. § 1983
Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(R.S. § 1979; Pub. L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.)

STATEMENT OF THE CASE

Respondent Raymond A. Berg, Jr. initiated these proceedings in an attempt to recover damages for false arrest, false imprisonment and violation of his rights to due process under the United States Constitution and the Fourth Amendment, Fifth Amendment and Fourteenth Amendment. His cause of action is based on 42 U.S.C. §§ 1983, 1988, 43 U.S.C. § 1985(b) and 28 U.S.C. § 1343. The United States District Court for the Western District of Pennsylvania dismissed his action. The United States Court of Appeals for the Third Circuit reviewed that matter pursuant to 28 U.S.C. § 1291. It affirmed in part and reversed in part. The County of Allegheny now seeks review or certiorari pursuant to 28 U.S.C. § 1254.

The County defendants, which initially included the County of Allegheny, Allegheny County Adult Probation Services, Debbie Benton, Richard R. Gardner and Ginny Demko, are all state actors and were acting as such at all times relevant to the respondent's cause of action. The respondent alleges, and it is not disputed, that Debbie Benton was a probation officer and that Richard R. Gardner was a supervisor of probation officers employed by the County in the Adult Probation and Parole Department. Ginny Demko was employed at all times as a warrant clerk in the Criminal Division of the Court of Common Pleas of Allegheny County. The respondent alleged in his Amended Complaint that on October 30, 1990, he was sentenced to forty-eight hours of rehabilitation treatment in the ARC Program from November 30, 1990, until his release on parole on December 2, 1990. The respondent was sentenced pursuant to charges of driving under the influence of alcohol. When the respondent was released on parole, Debbie Benton

of the Allegheny County Probation and Parole Office was assigned as his parole officer. The respondent eventually completed his term of parole in May of 1991. Thereafter, Debbie Benton did not have any further contact or dealing with Mr. Berg and was not involved with the issuance of the warrant for his arrest, which occurred on December 30, 1994.

On August 3, 1994, Richard R. Gardner, a supervisor employed by the Allegheny County Probation and Parole Office, received information concerning an individual by the name of Paul Banks, who was not complying with his probation requirements. Therefore, Mr. Gardner completed a Warrant Request Form on July 14, 1994, which was signed by the Honorable Paul A. Lutty, Jr. Pursuant to the Order of Judge Lutty, a request for an arrest warrant was issued in the form of an Arrest Warrant Information Sheet.

The facsimile Arrest Warrant Information Sheet was sent by Mr. Gardner to Ms. Demko who date-stamped it pursuant to the policies and procedures in effect at the time of the incident and sent it back to Mr. Gardner. The Arrest Warrant Information Sheet clearly indicates that Mr. Gardner requested that an arrest warrant be issued for Paul Banks, with criminal complaint no. 9004165. Having received the Arrest Warrant Information Sheet with the date stamp on it indicating that it was received and completed by the warrant office in the courthouse, Mr. Gardner assumed that a warrant had been issued for the arrest of Mr. Banks pursuant to his request and the Order of Judge Lutty.

A few days after August 6, 1994, Mr. Gardner was checking the computer system for the issuance of warrants and discovered that a warrant had not been entered for Paul Banks, and he contacted Ginny Demko in the warrant

office on August 16, 1994, advising that a warrant had not been issued for Mr. Banks, and she generated a warrant for his arrest on that same date. Mr. Gardner corrected the date on the original Arrest Warrant Information Sheet and initialed it, indicating that a warrant had now been issued for the arrest of Mr. Banks.

When Ms. Demko initially entered the criminal complaint number of Paul Banks, she inadvertently reversed the digits 4 and 1 so that the information brought up on the computer screen was actually that of the respondent, Raymond A. Berg, Jr. His criminal complaint number for his prior arrest was 9001465. Being that the names Berg and Banks were so similar, Ms. Demko, in checking the computer screen in her office, did not notice the difference in the last names. Ms. Demko pressed a 1 and a 4 instead of a 4 and a 1 when she was entering the criminal complaint number. Unfortunately, Ms. Demko did not check the other information on the computer screen with the Arrest Warrant Information Sheet sent by Mr. Gardner except for the address. She noticed that the address was incorrect, and she changed the address to what she believed at that time to be the current address of Mr. Berg and the warrant was issued.

The warrant for the arrest of Mr. Berg was forwarded to the Allegheny County Sheriff's Office where it was placed in a file with all of the other outstanding arrest warrants. Constable Glenn Allen Wolfgang, an independent contractor and a duly elected constable from the Borough of Manor in Westmoreland County, picked up the warrant in the Sheriff's Office and arrested Mr. Berg on December 30, 1994. Mr. Berg was thereafter taken to the Allegheny County Jail and, after proper processing, was placed in the jail. He was released on January 3, 1995. Mr. Gardner first became aware

that Mr. Berg was lodged in the Allegheny County Jail as a probation and parole violator when Peggie Viola, a clerk in the Probation and Parole Office, checked the jail list on January 3, 1995, and noticed that Mr. Berg was being housed in the jail as a result of a violation of a probation/ parole warrant. Immediately upon checking the system and determining that there was no warrant issued for the arrest of Mr. Berg, Mr. Gardner made arrangements to have Mr. Berg released from jail, which occurred on January 3, 1995.

There is no question that the warrant issued for the arrest of Mr. Berg was a mistake which was the result of Ms. Demko inadvertently reversing the digits 4 and 1 in the criminal complaint number of Mr. Banks. Ms. Demko testified that she has been employed as a warrant clerk since 1989 and that she issues approximately 500 warrants a month, which means that she had issued approximately 55,000 warrants over the past nine years. During that entire period of time, she was using the same computer system that was in place in August of 1994, when she made the mistake with respect to the warrant issued for the arrest of Mr. Berg. She testified that this was the only occasion when there was ever a mistake made in the warrant office which resulted in an arrest warrant being issued for someone other than the person for whom it was intended to be issued. Ms. Demko, in an effort to be efficient, corrected what she believed to be an incorrect address on the warrant. However, she did not notice that the birth date, the social security number, the criminal charges, and the probation officer were all different from what appeared on the computer screen for Mr. Berg and what was set forth on the Arrest Warrant Information Sheet.

Ms. Demko acknowledged she "made a mistake, a clerical mistake," one that had never occurred during the process of issuing over 55,000 warrants and one which has never occurred since this incident.

REASONS FOR GRANTING THE WRIT

I. THE PETITION SHOULD BE GRANTED BECAUSE THE IMPOSITION OF MUNICIPAL LIABILITY ABSENT A CUSTOM OR POLICY IS CONTRARY TO ESTABLISHED SUPREME COURT PRECEDENT AND BECAUSE THE THIRD CIRCUIT'S FINDING OF A PATTERN, PRACTICE, POLICY OR CUSTOM ON THE BASIS OF AN ISOLATED INSTANCE OF AN ERRONEOUSLY ISSUED WARRANT IS CONTRARY TO DECISIONS IN AT LEAST THREE OTHER JURISDICTIONS.

It is beyond question that a municipality cannot be found liable for a violation of one's constitutional rights under a theory of respondeat superior. *Monell v. Department of Social Services*, 436 U.S. 658 (1978). A municipality can only be found liable under 42 U.S.C. § 1983 for constitutional torts that amount to a custom or policy of the municipality. Furthermore, it has been established that a municipality can only be found liable in such a case when there is clear evidence that the official policy was the moving force behind the injury alleged. *Board of County Commissioners v. Brown*, 520 U.S. 397 (1997). The respondent has the burden of showing that the municipality's conduct was taken with a reckless degree of culpability and must demonstrate a direct causal connection between the municipality's action and the complained of constitutional deprivation.

Barney v. Pulsipher, 143 F.3d 1299 (10th Cir. 1998); *Palmer v. Unified Government of Wyandotte County*, 72 F. Supp. 2d 1237 (D. Kan. 1999). The obvious requirement that a municipality's liability be predicated upon "official policy" is to ensure that obligation to pay damages is based on its conduct as opposed the conduct of its employees. *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986). In order to establish liability on the part of a municipality, the municipal conduct has to be that which has been officially sanctioned or ordered. Therefore, the focus in any analysis has to be on whether there was a "policymaker" involved in the conduct which is alleged to have brought about the constitutional harm.

The Third Circuit bases its reversal of the order granting summary judgment in favor of the County on the assumption that the computer system which resulted in the issuance of 6,000 warrants a year could not have existed but for a County policy. Assuming that is a correct analysis, the scrutiny of the Court must be on whether the utilization of the computer system constituted a custom or policy which brought about the federal harm claimed by Mr. Berg.

It appears that the Third Circuit's rationale was that the implementation and operation of the computer system was a custom or policy of the County, and since the warrant for the arrest of Mr. Berg was issued by use of the computer system, the County had adopted a policy or custom which resulted in a violation of Mr. Berg's constitutional rights. However, it is submitted that the focus of the Third Circuit was misdirected. The analysis of whether a policy or custom existed must be on the conduct of the County which actually caused the respondent's alleged federal harm. There is no question that the error in this particular case occurred due to

Ms. Demko's clerical mistake in failing to compare the information regarding Mr. Berg on the computer screen which was brought up when she transposed two numbers with the information contained in the Arrest Warrant Information Sheet which was sent by Mr. Gardner. The computer system, and even Ms. Demko's training with respect to the use of the computer system, did not cause the erroneous warrant to be issued for the arrest of Mr. Berg. The problem was simply the carelessness of Ms. Demko in reading the information which was directly in front of her. Since this had never happened in the past and there is no evidence that it has happened since this particular incident, even though by the time Ms. Demko's deposition was taken, as many as 55,000 warrants had been issued, there was no factual basis to support a finding that a policy or custom existed within the County which resulted in a violation of Mr. Berg's constitutional rights.

What must be stressed in the analysis is the definitions of policy and custom which have been provided by the Supreme Court. The courts have held that a policy or a custom is a "course of action consciously chosen from among various alternatives." *City of Oklahoma v. Tuttle*, 471 U.S. 808 (1985); *Mariani v. City of Pittsburgh*, 624 F. Supp. 506 (W.D. Pa. 1986). Technically, the term policy denotes something which has been officially adopted, while the term custom denotes a practice which is so widespread, well-settled and permanent that it rises to the level of law. *Gilmere v. City of Atlanta*, 774 F.2d 1495 (11th Cir. 1985). The Third Circuit, in its opinion, stated that a custom is demonstrated by showing "practice is so well-settled and widespread that the policymaking officials have either actual or constructive knowledge of it." *Silva v. Worden*, 130 F.3d 26, 31 (1st Cir. 1997). Since the computer system is not what

caused the harm which Mr. Berg alleges he suffered, the focus has to be on the implementation and use of the computer system by Ginny Demko and Richard Gardner to see if a custom or policy existed. The question is, was there a pattern of erroneously issued arrest warrants due to county employees repeatedly making mistakes with respect to the use of the computer system? The answer is no, because an erroneous warrant had never been issued prior to or subsequent to this occasion.

What the Third Circuit has accomplished by means of its holding is to provide for municipal liability based on a single incident of employee carelessness and an analysis that the County should have been able to foresee that an employee could possibly make a mistake such as that which occurred even though it had never occurred before. Such a holding simply does not comport with the strict constitutional requirements concerning municipal liability which had been well established since the decision in *Monell* in 1978. The United States Court of Appeals for the Seventh Circuit has emphasized the requirement that there be repeated occasions of constitutionally questionable conduct before a municipality can be subject to liability. Specifically, the Seventh Circuit stated:

> Where a municipality has failed to make a policy in a situation that calls for procedures, rules, or regulations, the failure itself might be actionable, if, as the Supreme Court emphasized in *Collins*, the complaint otherwise alleges a constitutional violation. In those situations, however, the plaintiff generally must allege a pattern or series of incidents of unconstitutional conduct or a clear

> constitutional duty to take action because the situation was certain to recur. *See Cornfield*, 91 F.2d 1326-1327.

Harris v. City of Marion, Ind., 79 F.3d 56, 58-59 (7th Cir. 1996).

The undisputed evidence in *Harris* showed at most one incident similar to the one complained of and as the court stated, "one incident cannot be boostrapped into a pattern." *Harris*, 79 F.3d at 59.

The necessity of establishing a pattern or practice created by more than one incident was emphasized in *Stussy v. Los Angeles*, 1996 W.L. 742433 at *1 (9th Cir. 1996) (even if respondent could show constitutional violation resulting from misaddressing of criminal complaint notification letter, *no Monell* claim absent showing that "City habitually misaddressed notification letters"); *Palmer v. Unified Gov. of Wyandotte County*, 72 F. Supp. 2d 437, 1237 (D. Kan. 1999) (*no Monell* claim in a wrongful arrest caused by issuance of erroneous bench warrant coupled with glitch in court docketing system or human error for only one allegation of unconstitutional conduct); *Gilmere v. City of Atlanta*, 774 F.2d 1495 (11th Cir. 1985) (*no Monell* claim when at most respondent established that the city failed to train one single policeman properly in the appropriate methods of avoiding the use of deadly force since the plaintiff's proof did not satisfy requirement that failure resulted from a custom that was "so permanent and well settled" as to have "the force of law.") *Monell*, 436 U.S. at 691.

It is apparent that the decision of the Third Circuit is contrary to the decisions of other appellate jurisdictions which have consistently held that a single incident in situations such as that presently before the Court, does not establish a custom or policy which can subject a municipality to liability. As such, the decision of the Third Circuit in remanding the case to the District Court for trial on the County of Allegheny's liability should be reversed and the judgment in favor of Allegheny County should be reinstated.

II. THE PETITION SHOULD BE GRANTED BECAUSE THE IMPOSITION OF MUNICIPAL LIABILITY FOR FAILURE TO TRAIN WITHOUT PROOF OF A PRIOR OCCURRENCE OF THE ERRONEOUS ISSUANCE OF A WARRANT CONFLICTS WITH PRIOR SUPREME COURT PRECEDENTS.

The analysis concerning whether there existed a failure to train the employees of the County is similar to that concerning whether a policy or custom existed which resulted in a violation of the plaintiff's constitutional rights. The predicate to both analyses is evidence that conduct resulting in constitutional harm had occurred on repeated occasions so as to put the municipality on notice of the existence of a policy or a custom, which needed to be addressed by means of training its employees so as to avoid or prevent the federal harm. Similarly, as is true with respect to finding a municipal liable for the existence of a custom or policy, the failure to train an employee must have been taken with "deliberate indifference" as to the known or obvious consequences. As the Third Circuit points out in its opinion when referencing from *Board of County Commissioners of Bryan County v. Brown*, 520 U.S.

397 (1997) and *City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989), if, as here, the policy or custom does not facially violate federal law, causation can be established only by "demonstrat[ing] that the municipal action was taken with 'deliberate indifference' as to its known or obvious consequences. A showing of a simple or even heightened negligence will not suffice." *Berg*, 219 F.3d 261 at 276 (3d Cir. 2000). The Third Circuit has determined that the policy or custom that gives rise to the County's liability is the implementation and operation of the computer system. However, it further determined that the system does not facially violate federal law. Therefore, there must be facts to establish the existence of conduct or actions on the part of the County which put the County on notice of repeated constitutional harm, and facts to show that the County's action in the face of the known or obvious constitutional harm was taken with deliberate indifference to the existence of such harm.

As is properly pointed out by the Third Circuit, even heightened negligence is not sufficient to meet the deliberate indifference requirement. The Third Circuit goes on to state that the County's failure to train or screen its employees adequately can be considered deliberate indifference, but only where the failure has caused a "pattern of violations." There are no facts in the present case to establish that there was another incident when an arrest warrant was erroneously issued by the clerk's office. The Third Circuit states that, "[t]he record contains no evidence of procedures guarding against Demko's mistake." 219 F.3d at 276. However, the record also does not establish that there ever was a mistake similar to that made by Ms. Demko so as to establish a need for particular procedures.

The facts of this case do not present a situation where Ms. Demko was recently put into a position which was newly created, and as such, the County should have anticipated or expected that she would make mistakes. The facts of this case are that Ms. Demko performed her job for over nine years, had issued over 55,000 warrants by means of the exact same policy and procedure and there had never been an incident when an erroneous warrant was issued.

It is possible that in this modern day of computer technology there may be additional safeguards and crosschecks which can be implemented following an after-the-fact analysis of a mistake. However, what could possibly have been done following an after-the-fact review is not the analysis which the federal courts have required in establishing municipal liability. The issue is what the municipality should have done in light of known and repeated conduct on the part of a municipal employee which created the requisite custom or policy of the municipality. To introduce a standard that a municipality must have foreseen a possible problem when none had ever existed prior, results in the incorporation of common law negligent concepts into the jurisprudence of municipal liability.

Finally, the Third Circuit draws an analogy to situations in which there has been a finding of deliberate indifference to the obvious risk involved in arming officers without training them with respect to the use of firearms. This analogy presumably was made to support the position that repeated occasions of harm are not always necessary to display deliberate indifference. However, it is submitted that there is no basis for an analogy between failing to train officers with respect to the use of firearms which by design are to harm, hurt, maim or injure people and the use of a computer

system that worked without failure for over nine years and through which there were more than 55,000 warrants processed. Whenever a policeman uses a firearm, it is for the purpose of inflicting harm. As such, it is obvious that improper training with respect to the use of the firearm could very easily result in a violation of one's constitutional rights. That analogy does not apply with respect to the use of a computer system which had never failed in the past and to date has never failed except for the one instance when Ms. Demko transposed two numbers.

There is a complete absence of fact to establish the County exhibited deliberate indifference to individuals situated such as Mr. Berg and that there existed a policy which was the "moving force" behind the alleged constitutional violation suffered by Mr. Berg. *See Bryan County.*

III. THE PETITION SHOULD BE GRANTED BECAUSE THE THIRD CIRCUIT HAS IMPOSED MUNICIPAL LIABILITY BASED ON NEGLIGENCE STANDARDS, CONTRARY TO ESTABLISHED SUPREME COURT DECISIONS.

As pointed out above, the decision of the Third Circuit has introduced the concept of foreseeability into cases involving constitutional liability on the part of a municipality. The Third Circuit reasoned that Allegheny County knew or should have known that its computer system and the operation of that system could potentially result in the type of harm allegedly suffered by Mr. Berg. This is despite the fact that a similar situation had never occurred in the past.

The Third Circuit properly stated that when imposing municipal liability, a showing of simple or even heightened negligence is not sufficient. *Berg v. County of Allegheny*, 219 F.3d 261 at 276 (3d Cir. 2000), *also see Bryan County v. Brown*, 520 U.S. 397 at 407 (1997); *City of Canton, Ohio v. Harris*, 489 U.S. 378, 389 (1989). The Federal Court's have consistently and very clearly made a distinction between constitutional claims and common law state claims.

> Our constitution deals with the larger concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society. We have previously rejected reasoning that " 'would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States,' " *Paul v. Davis*, 424 U.S. 693, 701, 96 S.Ct. 1155, 1160, 40 L.Ed.2d 405 (1976), quoted in *Parratt v. Taylor*, 451 U.S., at 544, 101 S.Ct. at 1917.

Daniels v. Williams, 474 U.S. 327, 332 (1986).

The Third Circuit based its reversal of summary judgment entered in favor of the County on the premise that "the record contains no evidence of procedures guarding against Demko's mistake, . . . Having employed a design where the slip of a finger could result in wrongful arrest and imprisonment, there remains an issue of fact whether the County was deliberately indifference to an obvious risk." *Berg*, 219 F.3d at 277. However, there is absolutely no evidence on record which indicates that a mistake like this

had ever occurred in the past, therefore, the Third Circuit is basing its reversal of the District Court's order on the concept of foreseeability. The Third Circuit is of the opinion that the County should have known that a "slip of the finger" could result in the issuance of an erroneous warrant. This is despite the fact that over a period of nine years and the issuance of over fifty-five thousand warrants, a similar mistake had never been made.

Finally, the Third Circuit creates the impression that there were no other "double checks" or protective measures to guard against an erroneous warrant being issued because of a "slip of the finger". However, the record clearly establishes that there were numerous cross-checks that were available to a person operating the system, and they includes (1) the full name, (2) identification of the criminal charges, (3) date of birth, (4) social security number, (5) sex, (6) height, (7) weight, (8) race, (9) color of eyes, (10) color of hair, and (11) address. A mere slip of the finger would bring up a profile on an individual that has numerous means of cross-checking information contained on the Arrest Warrant Information Sheet. Unfortunately, Ms. Demko did not read the information on the computer screen carefully and compare it with the information on the Arrest Warrant Information Sheet, and as such she inadvertently issued a warrant for Mr. Berg as opposed to Mr. Banks. "Where a government official's act causing injury to life, liberty or property is merely negligent, 'no procedure for compensation is constitutionally required.' *Parratt*, *supra*, 451, U.S. at 548, 101 S. Ct. at 1919 (POWELL, J., concurring in result)." *Daniels v. Williams*, 474 U.S. 327 at 333 (1986).

It is submitted that the holding of the Third Circuit subjects municipalities throughout the entire country to constitutional liability where an employee was negligent and the municipality should have foreseen the possibility that an employee could make a mistake.

CONCLUSION

The Third Circuit extended municipal liability beyond the parameters set by this Honorable Court and at least three other jurisdictions. The imposition of municipal liability without a pattern, practice, policy or custom conflicts with such seminal cases as *Monell*. Further, the Third Circuit's finding of a practice based on one isolated instance of the issuance of one erroneous warrant is contrary to the decisions of at least three other jurisdictions. Lastly, the Third Circuit has improperly injected negligence concepts into the realm of municipal liability, contrary to settled precedents of this Honorable Court.

Respectfully submitted,

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APPENDIX

APPENDIX — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA DATED SEPTEMBER 22, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 97-928

RAYMOND A. BERG, JR.,

Plaintiff,

– vs –

COUNTY OF ALLEGHENY, ALLEGHENY COUNTY ADULT PROBATION SERVICES, RICHARD A. GARDNER, GLENN ALLEN WOLFGANG and GINNY DEMKO,

Defendants.

AMBROSE, District Judge.

OPINION
and
ORDER OF COURT

Plaintiff Raymond A. Berg ("Berg") initiated this action against Allegheny County, Allegheny County Adult Probation Services, Richard Gardner, Ginny Demko ("the County Defendants") and Glenn Wolfgang,[1] for civil rights

1. While Berg also named Debbie Benton as a Defendant, all claims in this regard have been voluntarily dismissed.

violations arising from an erroneous arrest. Briefly, Berg, who had successfully completed his parole requirements related to a DUI charge, was rearrested on December 30, 1994, when a clerk inadvertently transposed two digits of a "Criminal Complaint Number." The warrant was originally requested for a Paul Banks. Berg was incarcerated for several days until the error was corrected.

Pending is Wolfgang's Motion for Summary Judgment (Docket No. 26). Wolfgang, the constable who arrested Berg, characterizes the claims as fatally deficient in that he served and executed a facially valid warrant. The warrant, Wolfgang maintains, gave him probable cause, so as to defeat Berg's constitutional claims.[2]

After careful consideration, and for the reasons set forth below, the Motion is granted and judgment is entered against Berg on all claims asserted against Wolfgang.

STANDARD

Summary judgment may only be granted if the pleadings, depositions, answers to interrogatories and admissions on file, together with any affidavits, show that there is no genuine issue as to any material facts and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Rule 56 mandates the entry of judgment, after adequate time for discovery and upon motion, against the party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on

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2. Because I agree with Wolfgang in this regard, I need not address his claim of qualified immunity.

which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

In considering a motion for summary judgment, the court must examine the facts in the light most favorable to the party opposing the motion. *International Raw Materials, Ltd. v. Stauffer Chemical Co.*, 898 F.2d 946, 949 (3d Cir. 1990). The burden is on the moving party to demonstrate that the evidence is such that a reasonable jury could not return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is material when it might affect the outcome of the suit under the governing law. *Id.* Where the non-moving party will bear the burden of proof at trial, the party moving for summary judgment may meet its burden by showing that the evidentiary materials of record, if reduced to admissible evidence, would be insufficient to carry the nonmovant's burden of proof at trial. *Celotex*, 477 U.S. at 322. Once the moving party satisfies its burden, the burden shifts to the nonmoving party, who must go beyond its pleadings, and designate specific facts by the use of affidavits, depositions, admissions, or answers to interrogatories showing that there is a genuine issue for trial. *Id.* at 324.

ANALYSIS

Berg seeks to impose liability under 42 U.S.C. § 1983 upon Wolfgang for violations of his constitutional rights to be free from false imprisonment, malicious prosecution and unlawful arrest.[3] To prevail upon each claim, Berg must

3. Although the Complaint references 42 U.S.C. § 1985 as well, Berg does not allege that Wolfgang conspired in any manner to deprive Berg of his constitutional rights.

demonstrate, in part, that Wolfgang acted without probable cause in executing the warrant. *See Dowling v. City of Philadelphia*, 855 F.2d 136, 141 (3d Cir. 1988) (recognizing that "[t]he proper inquiry in a section 1983 claim based on false arrest or misuse of the criminal process is not whether the person arrested in fact committed the offense but whether the arresting officers had probable cause to believe the person arrested had committed the offense."); *Groman v. Township of Manalapan*, 47 F.3d 628, 636 (3d Cir. 1995) (stating that "[t]he Court in *Baker v. McCollan*, 443 U.S. 137, 142 (1979)] made it clear an arrest based on probable cause could not become the source of a claim for false imprisonment."); and *Hilfirty v. Shipman*, 91 F.3d 573, 579 (3d Cir. 1996) (stating that, to succeed on a § 1983 claim for malicious prosecution, the plaintiff must prove that "the proceeding was initiated without probable cause."). This, Wolfgang maintains, Berg is unable to do.

"Whether an officer had probable cause to believe an individual committed an offense is an objective test, based on the facts available to the officers at the moment of arrest." *Duffy*, 1998 WL 264144 at * 4, *citing*, *Barna v. City of Perth Amboy*, 42 F.3d 809, 819 (3d Cir. 1994). The Third Circuit court explains that:

> [p]robable cause to arrest requires more than mere suspicion, however, it does not require that the officer have evidence sufficient to prove guilt beyond a reasonable doubt. Rather, probable cause to arrest exists when the facts and circumstances within the arresting officer's knowledge are sufficient in themselves to warrant

> a reasonable person to believe that an offense has been or is being committed by the person to be arrested.

Orsatti v. New Jersey State Police, 71 F.3d 480, 482-83 (3d Cir. 1995) (internal citations omitted); *see also Kis v. County of Schuykill*, 866 F. Supp. 1462, 1469 (E.D. Pa. 1994) (stating that "[p]robable cause to arrest exists where the arresting officer has knowledge of facts and circumstances sufficient to permit a prudent person of reasonable caution to believe that the person arrested has committed an offense."). "Sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment." *Hill v. California*, 401 U.S. 797, 804 (1971).

Here, the parties disagree as to whether Wolfgang had probable cause to arrest Berg. Wolfgang contends that the bench warrant constituted probable cause. Berg, in turn, challenges the validity of the warrant.[4]

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4. It is somewhat difficult to discern Berg's contentions in this regard. Most significantly, the only portion of his Brief in Opposition to Summary Judgment pertaining to the claims against Wolfgang is entitled "Is a Constable entitled to qualified immunity?" *See* Docket No. 30, p. 15. Nowhere does Berg explicitly address Wolfgang's contention that the existence of a facially valid warrant establishes probable cause, and precludes the violation of any underlying constitutional right. Resort need be made to a defense of qualified immunity only where there was no probable cause. In such an instance, an officer may nevertheless be shielded from liability if "a reasonable officer could have believed [the arrest] to be lawful, in light of clearly established law and the information the arresting officer possessed." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (Cont'd)

"It is well-settled that probable cause generally exists when a police officer makes an arrest pursuant to a warrant which meets the requirements of the Fourth Amendment." *Kis*, 866 F. Supp. at 1469, *citing*, *Baker*, 443 U.S. at 144 and *Graham v. Connor*, 490 U.S. 386, 389 (1989). "The arrest warrant must contain 'the name of the defendant or, if his name is unknown, any name or description by which he can be described with reasonable certainty." *Kis*, 866 F. Supp. at 1469, *quoting*, Fed. R. Crim. P. 4(c)(1). "[A] warrant that correctly names the person to be arrested generally satisfies the requirements of the Fourth Amendment . . . ." *Id.*, *citing*, *Powe v. Chicago*, 664 F.2d 639, 645 (7th Cir. 1981), and *Cooper v. City of Chester*, 810 F. Supp. 618, 621 (E.D. Pa. 1992).

Here, there is no dispute that the warrant properly set forth Berg's name. Nevertheless, Berg challenges the facial validity of the arrest warrant in two manners. First, he complains that the warrant was "dated" — it having been issued approximately 4 months prior to execution. Yet it is undisputed that the warrant remained in effect — that it had not been withdrawn. Indeed, Wolfgang confirmed the validity on two occasions. Moreover, Berg has not cited to any case law for the proposition that the validity of a warrant is somehow compromised if it is 4 months old. Consequently, I reject this challenge as unpersuasive.

(Cont'd)

(citations omitted). However, because Berg's contentions with respect to the doctrine of qualified immunity also make reference to the "facial validity of the warrant," I will consider his challenges in this regard to be made in response to Wolfgang's first argument regarding probable cause.

Second, Berg characterizes the warrant as invalid because it set forth an incorrect address. Yet, the Third Circuit court has opined that a mere technical error on the face of an arrest warrant does not automatically invalidate the warrant. *See United States v. Carter*, 756 F.2d 310 (3d Cir. 1985), *cert. denied*, 478 U.S. 1009 (1986). Indeed, the United States District Court for the Eastern District of Pennsylvania has specifically held that the listed address is irrelevant to the validity of a warrant. *See Cerva v. Fulmer*, 596 F. Supp. 86, 90 (E.D. Pa. 1984). Thus, I find Berg's challenges to be without merit.

Baker and its progeny suggest that the analysis would end here — Berg was arrested pursuant to a valid warrant and therefore no § 1983 claim can arise as against Wolfgang. Again, although it is in the context of refuting Wolfgang's invocation of the qualified immunity doctrine, Berg makes some assertions that may implicate the issue of probable cause. Specifically, Berg contends that his lack of flight, his possession of a valid drivers' license, his "socio-economic status", certain "court papers" and friends who had vouched for his innocence, should have caused Wolfgang to doubt the validity of the warrant. *See* Docket No. 30, p. 17-18.

While I am uncertain as to whether such contentions are relevant to the issue of probable cause when an arrest is made pursuant to a valid warrant, at least one court suggests that they are. *See Cooper v. City of Chester*, 810 F. Supp. 618 (E.D. Pa. 1992). In *Cooper*, the court determined that, aside from challenges to the validity of a warrant, a plaintiff may "question the constitutionality of the arrest itself." *Cooper*, 810 F. Supp. at 622. The Complaint in *Cooper* contained

averments that " 'Defendants knew, or upon minimal investigation could have determined that the plaintiff was not their man.' " *Id.*, *quoting*, Complaint, ¶ 6. The court thus surmised that "plaintiff has alleged that defendants deliberately arrested a person who they knew was not the subject of the warrant they were carrying. Such an arrest is without probable cause, and thus violates the fourth amendment." *Id.*

While it is not at all clear that Berg intended to raise such an argument, given that the relevant allegations were couched within a qualified immunity argument, I will give him the benefit of the doubt. Additionally, although research did not disclose any subsequent citation to the *Cooper* decision for the proposition recited above, I will presume that the *Cooper* court's analysis is sound. Despite these assumptions, however, I find Berg's protestations to be without merit.

It is well established that "a sheriff executing an arrest warrant is [not] required by the Constitution to investigate independently every claim of innocence, whether the claim is based on mistaken identity or a defense such as lack of requisite intent." *Baker*, 443 U.S. at 145-46. Indeed, as the Supreme Court recognized in *Hill v. California*, 401 U.S. 797, 803 (1971), many arrestees attempt to avoid arrest by producing false identification. Comments from Berg's friends that he was innocent are akin to the production of documents exonerating him. Consequently, I believe that reasonable jurors could only find that Wolfgang's apparent failure to give credence to certain documents and protestations of innocence did not, when he had a valid bench

warrant, amount to deliberately arresting a person who he knew was not the subject of the warrant.[5]

5. I find Berg's reference to "socio-economic status" to be misguided. Apparently, Berg would have this Court accept the proposition that only members of an economically depressed class would be the subject of a warrant. I decline to accept such a proposition. Additionally, Berg provides no citation to authority for the contention that his failure to flee would have compelled Wolfgang to question the accuracy of the warrant. Again, I find that reasonable jurors could only conclude that Wolfgang had probable cause to effectuate the bench warrant when he was certain of the warrant's validity.

Appendix

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 97-928

RAYMOND A. BERG, JR.,

Plaintiff,

– vs –

COUNTY OF ALLEGHENY, ALLEGHENY COUNTY ADULT PROBATION SERVICES, RICHARD A. GARDNER, GLENN ALLEN WOLFGANG and GINNY DEMKO,

Defendants.

AMBROSE, District Judge.

ORDER OF COURT

AND NOW, this 22nd day of September, 1998, after careful consideration of the submissions of the parties and for the reasons set forth within, it is hereby **ORDERED** that the Defendant's Motion for Summary Judgment (Docket No. 26) is **GRANTED**. Judgment is entered in **FAVOR** of Defendant Wolfgang, and **AGAINST** Plaintiff, on all claims.

BY THE COURT:

s/ Donetta W. Ambrose
Donetta W. Ambrose,
U.S. District Judge